

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2005-0009

In the Matter of the Petition of

**HUMBOLDT WATERSHED COUNCIL, ENVIRONMENTAL PROTECTION
INFORMATION CENTER, AND SIERRA CLUB**

For Review of Directive to Enroll Pacific Lumber Company Timber Harvesting
Plans under General Waste Discharge Requirements, Order No. R1-2004-0030
California Regional Water Quality Control Board,
North Coast Region

SWRCB/OCC FILES A-1683 AND A-1692

BY THE BOARD:

In late 2004 and early 2005, Pacific Lumber Company (PALCO) made several requests that the North Coast Regional Water Quality Control Board (North Coast Water Board) allow additional timber harvesting in the Freshwater Creek and Elk River drainages.¹ The California Department of Forestry and Fire Protection (CDF) had already approved this timber harvesting.² On November 29, 2004, and on March 16, 2005, the North Coast Water Board adopted motions directing its Executive Officer to enroll additional timber harvesting plans (THPs) submitted by PALCO under General Waste Discharge Requirements Order No. R1-2004-0030 (General Order).³ The first group of THPs, enrolled by the Executive Officer on December 24, 2004, allowed PALCO to harvest timber on approximately 25% of the land covered by the various THPs. Thereafter, in February 2005, the Executive Officer enrolled an

¹ These two drainages in Humboldt County were previously subject to State Water Resources Control Board (State Water Board) review. WQO 2002-0004 (Petition of Humboldt Watershed Council, et al.) The State Water Board found that there was evidence of significant water quality problems in the drainages warranting several alternative and expedited approaches to those problems. (p. 6.) The North Coast Water Board was directed to take action consistent with those conclusions and to report back to the State Water Board at regular intervals. (p. 8.)

² CDF had approved timber harvesting plans (THPs) for this additional logging, but the North Coast Water Board had not yet approved the logging.

³ The North Coast Water Board had adopted the General Order on June 23, 2004.

additional group of THPs under the General Order, bringing the acreage on which timber operations could be conducted to about 50% of the total. The March 16 motion directed the Executive Officer to enroll additional acreage, such that the total area covered by the General Order in these two drainages equaled about 75% of the acreage in the THPs previously approved by CDF.⁴

On December 19, 2004, the Humboldt Watershed Council filed a petition challenging the November Board resolution and the Executive Officer's actions based thereon. On March 22, 2005, the Humboldt Watershed Council filed another petition with the State Water Board on behalf of itself and the Environmental Protection Information Center,⁵ contesting the validity of the March motion. In both cases, a stay was requested. A stay was denied in response to the December petition (WQO 2005-0001) but, on April 6, 2005, a stay of the effects of the March motion was issued (WQO 2005-0006) and remains in effect. Because most of the issues raised in each petition are applicable to the other, we have combined the two for purposes of this order.⁶

I. BACKGROUND

PALCO has been harvesting timber along the north coast of California for many decades. In recent years, after a change in ownership and management of the company, a number of complaints have been received by the North Coast Water Board about flooding damage to property and significant impacts on water quality and fisheries resulting from runoff of dirt and debris from PALCO sites. In December 2003, the North Coast Water Board determined that its

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⁴ All THPs are based on "clearcut equivalent acreage" but, for simplicity sake, "acreage" is used throughout this order.

⁵ The Sierra Club was later added as a petitioning party at the request of the Council.

⁶ No petition was filed challenging the February enrollments. This order does not address those.

existing regulatory approach in that area was insufficient to protect water quality.⁷ The Board decided to prepare watershed-based waste discharge requirements to address the cumulative impacts of past and future timber activities. The Board allowed anyone who was still operating under the waiver order (R1-2003-0116) to continue operating until January 1, 2005, by which time they hoped to have the watershed-based requirements in place. Because of delays, caused in part by PALCO,⁸ the adoption of the watershed requirements has been delayed until the summer of 2005.

With the expiration of the remaining waivers and the delay in adoption of the new watershed requirements, PALCO had no legal authority to discharge wastes from timber operations in the Freshwater Creek or Elk River drainages after January 1, 2005. To bridge this gap, PALCO asked the North Coast Water Board to allow it to proceed on a number of THPs under the auspices of the General Order, until such time as the watershed-based requirements could be adopted. As was noted above, three separate groups of THPs were either enrolled or directed to be enrolled under the General Order, one group in December 2004, one in February 2005, and one in March 2005. Together they represent about 75% of the PALCO acreage approved for harvesting by CDF in the Freshwater Creek and Elk River.

II. CONTENTIONS AND FINDINGS⁹

Contention: Petitioners contend that it was improper to enroll THPs in the Elk River and Freshwater Creek drainages under the General Order. They allege that the General Order was not intended to cover these THPs and that the North Coast Water Board failed to comply with the California Environmental Quality Act (CEQA).

⁷ The recent history of regulating timber harvests is complicated. A general waiver covered all timber harvests from 1987 until 2002. That year the North Coast Water Board adopted an "Interim Categorical Waiver for Discharges Related to Timber Operations in the North Coast Region," Order No. R1-2002-0109. That order expired on December 31, 2003, and was replaced by another similarly titled order, No. R1-2003-0116, which was adopted on November 5, 2003. Four months later, on March 24, 2004, the North Coast Water Board adopted another order waiving waste discharge only on federal lands and explicitly rescinding those portions of R1-2003-0116 that pertained to federal lands. The remaining portions of R1-2003-0116 were rescinded by the adoption of the General Order on June 23, 2004. After that date, new timber harvesting on non-federal lands was allowed only by inclusion in the General Order or by issuance of site-specific waste discharge requirements.

⁸ Testimony of North Coast Water Board Executive Officer at January 19, 2005 State Water Board hearing. North Coast Water Board Response Brief for Stay Hearing, March 31, 2005.

⁹ All issues not addressed in this order are dismissed. See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052(a)(1).

Finding: We agree with Petitioners' contentions. Water Code section 13223 sets forth what can and cannot be delegated by a regional water board to its Executive Officer. The issuance of waste discharge requirements is specifically made non-delegable. Under a general order, the regional water board sets up a framework for the enrollment of eligible dischargers. The order includes enrollment criteria, sufficiently specific that the decision to include a discharger under those general waste discharge requirements becomes a ministerial rather than a discretionary function.¹⁰ Because the discretionary decision about who may be enrolled has been made in advance by the regional water board, the delegation of such a ministerial role to the Executive Officer is not a violation of the provisions of Water Code section 13223.

In this case, the North Coast Water Board adopted the General Order so that certain timber harvesting operations, already approved by CDF, could proceed. The Board restricted the applicability of the General Order in substantial ways. In Section V of the General Order, the Executive Officer is specifically directed not to enroll any project if it fails to meet any of eight listed standards. Petitioners claim that the PALCO THPs fail to meet two of those listed standards:

- A. 4. Where conditions unique to the watershed or watershed segment (including, but not limited to, cumulative impacts, special hydrographic characteristics, Total Maximum Daily Load standards, the extent of timber harvest activities, intensity of ground disturbing activities, large acreage ownership holdings or management plans, rainfall, slopes, soil, effected [*sic*] domestic water supplies, an increased risk of flooding, or proximity to local, State, or National Parks) warrant further regulation;
5. Where past land use activities unique to the watershed or watershed segment resulted in the discharge of human generated sediment in amounts which warrant further regulation.

The North Coast Water Board has acknowledged that some of the conditions listed in paragraphs 4 and 5 exist in the two drainages. For example, in the letter enrolling PALCO's THP (1-03-198 HUM) under the General Order, the Executive Officer, referring to the passage quoted above, wrote:

¹⁰ A ministerial function involves no discretion. If an applicant satisfies certain prescribed requirements, the permit must be granted. If any of the prescribed requirements is not present, the permit must be denied. Mitigation measures do not change the situation.

As evidenced in the record, numerous of these conditions in Freshwater Creek underlie the previous watershed-specific WDRs and the more recent Board directives to prepare new, more effective WWDRs for this watershed (and the Elk River watershed).¹¹

Furthermore, some of the observations made by the State Water Board in WQO 2002-0004 are directly on point. The State Water Board did not make specific factual findings in that order but did state that the evidence before it was “sufficient to warrant further review and consideration of the alternative actions identified in the staff report.”¹² The order went on to note that TMDLs are proposed for both watersheds and that accelerating the schedule for adoption of those TMDLs ought to be considered by the North Coast Water Board. TMDLs are needed because the watersheds are severely impaired by sediment.

Plainly, the enrollment of the Freshwater Creek and Elk River THPs under General Order R1-2004-0030 is problematic because the THPs do not seem to meet two of the criteria. Even if the THPs did meet the criteria, it appears that the CEQA document prepared for the General Order does not encompass these THPs. The North Coast Water Board prepared a negative declaration in support of its adoption of the General Order. Whether the project is the General Order, as the North Coast Water Board defined it, or timber harvesting, as some have argued, the CEQA analysis that resulted in the adoption of a negative declaration is confined to the terms of that document. The environmental impacts addressed by the document do not go beyond the exact conditions of the General Order. The eight listed standards discussed above were integral to any listing of potential environmental consequences when it was determined that no significant environmental effects would result from the project. Any attempt to modify or supplement the General Order raises brand new CEQA issues that would require further analysis and documentation.

In approving the enrollment of some of PALCO’s THPs under the General Order, the North Coast Water Board conceded that these THPs did not meet all of the standards, but

¹¹ Letter from Catherine Kuhlman to Steven Horner, PALCO’s Director of Sustainable Forestry. (December 24, 2004). The reference is to the North Coast Water Board’s preference to issue new watershed WDRs for these THPs, rather than covering them under the existing General Order. Similar language is included in other enrollment letters.

¹² Order No. WQ 2002-0004, p. 6. The reference to “alternative actions” encompassed five proposals including time schedule orders for technical reports, cease and desist orders, and individual waste discharge requirements for all timber harvest plans.

justified its efforts by pointing to supplemental mitigation measures that were being imposed on PALCO as a condition of the enrollments.¹³ No CEQA analysis was done to determine whether allowing the enrollment of those particular plans under the General Order would cause a significant environmental impact or whether the mitigation would be sufficient to lessen such an impact to acceptable levels.¹⁴ The CEQA document, as approved by the North Coast Water Board, does not support the motions adopted by the Board in November and March nor does it address the potential impacts from the logging under these THPs. In directing the Executive Officer to enroll those THPs, the North Coast Water Board violated CEQA.¹⁵

III. SUMMARY AND CONCLUSIONS

Without addressing all of the issues raised by Petitioners, we find that the North Coast Water Board acted improperly in ordering the enrollment of THPs for PALCO in the Freshwater Creek and Elk River drainages in November 2004 and March 2005. Not only was enrollment inconsistent with the terms of the General Order itself but the decision to enroll was not supported by a CEQA analysis.

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¹³ The letters sent to PALCO by the Executive Officer on December 24, 2004 refer to “limiting the clearcut-equivalent harvest acreage” and “other conditions set out below” to justify coverage under the General Order. At the March 2005 Board meeting, the maker of the motion herein at issue attached four conditions that he described as “mitigation” to the approval of further timber harvesting. Transcript of March 16, 005 hearing, pp. 189-194.

¹⁴ PALCO’s assertion that CDF’s CEQA findings (inherent in approval of a THP) bind the Regional Water Board, misses the point. The issue in this matter is the negative declaration that supported the adoption of the General Order. CEQA analysis of specific projects does not bear on that issue.

¹⁵ Although it does not bear on our decision, a document entitled “Comments on the *Pacific Lumber Company Economic White Paper*” by State Water Board staff member Michael Gjerde will be added to the record. Petitioners made a timely request for its inclusion and it meets the requirements of our regulations. (Cal. Code Regs., tit. 23, § 2050.6.) Likewise the “Submission of Dr. William McKillop,” offered by PALCO on June 14, 2005, will be added to the record though it, too, does not bear on our decision.

IV. ORDER

IT IS HEREBY ORDERED that the petitions are sustained to the extent discussed above, all enrollments made pursuant to the November 29, 2004, and March 16, 2005, North Coast Water Board motions are vacated, and no further enrollments of PALCO THPs in the Elk River or Freshwater Creek watersheds may be made under the General Order.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 16, 2005.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gerald D. Secundy
Tam M. Doduc

NO: None.

ABSENT: None.

ABSTAIN: None.


Debbie Irvin
Clerk to the Board